That section has no application to a case like this. "It was intended to provide how a widow must proceed who desires to reject the provisions made for her by her husband's will out of property other than her own and take such interest in his lands as the law gives her. Where a testator disposes of property belonging to his wife in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person, and whether or not she has elected to take under or against the will is to be determined as in other cases." Pence *v.* Life, 104 Va. 518, 521, 52 S. E. 257, and cases cited; Showalter *v* Showalter, supra.

We are of opinion that the appellant has not yet made an irrevocable election, and that the trial court erred in holding that she had.

We are further of opinion that the trial court in the decree appealed from properly construed the will, and that the cross-error assigned is without merit.

For the error in the decree holding that the appellant had made a binding election, the decree must be reversed, and the cause remanded to be further proceeded in not in conflict with the views expressed in this opinion and with liberty to the appellant to make her election between her fee-simple interest in the dwelling house property and the life estate or less in all the property disposed of by her husband's will.

Reversed.

MEADE *et al. v.* KING *et al.*

Sept. 15, 1910.

[68 S. E. 997.]

1. Quieting Title (§§ 10, 12*)—Prerequisites to Remedy—Legal Title and Possession.—To sue to cancel a deed as a cloud on title, plaintiff must allege and prove that he holds the legal title and possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 8-12, 36-45; Dec. Dig. §§ 10, 12.*]

2. Quieting Title (§ 12*)—Possession of Plaintiff—Sufficiency to Maintain Action.—Since a landlord's rights under a lease devolved upon his grantees, an attempted attornment by the tenant to plaintiffs by delivering the keys was a fraud on the landlord's rights, and plaintiff's cannot rely on it as showing a possession entitling them to sue to quiet title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 8-12, 44, 45; Dec. Dig. § 12.*]

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Appeal from Circuit Court, Russell County.

Bill by J. D. King and another against Robert B. Meade and another. From a decree for complainants, defendants appeal. Reversed.

WHITTLE, J. This is a suit in equity brought by the appellees, J. D. and Esther King (who assert ownership and possession of the land in controversy, and title to certain personal property, by deed from Margaret E. Patrick dated July 13, 1907), to set aside a deed of August 25, 1906, from Isaac L. Patrick and Margaret E. Patrick, his wife, conveying the same property to the appellants, Robert B. and Alice M. Meade, as creating a cloud on their title to the land. The consideration for both deeds was the support and maintenance of the grantors. The deed to the appellants also stipulated that they should add a room to their dwelling for the occupancy of the grantors, which was done, and Patrick and wife moved to the residence of appellants where they dwelt until November 25, 1906, when Isaac L. Patrick died.

In July, 1907, Mrs. Patrick, who was in very feeble health at the time, against the remonstrance of the appellants, left their home and was taken to the home of the appellees, where, having executed the deed of July 13, 1907, she died on August 25th following.

The alleged source of power in Mrs. Patrick to execute the deed of July 13th is a will made by her late husband, dated April 7, 1906, in which, after providing for the payment of debts, he gives his entire estate to his wife. Appellants insist that this will was revoked and rendered wholly inoperative by the subsequent deed from the testator and wife which invested them with the complete title to the property, subject to be divested only by their failure to perform the conditions subsequent contained in their deed.

It was, moreover, contended that the breach of a condition subsequent does not ipso facto operate a reverter of the title, and the estate continues in full force until proper proceedings are taken to consummate the forfeiture, either by the grantor in his lifetime or his heirs at law, and that an unenforced right of reverter in property is not the subject of devise.

In our view of the case, it is not necessary to consider the issues of law and fact raised by these contentions. The sole ground of equitable jurisdiction set up in the bill is for the cancellation of the appellants' deed, as casting a cloud on the appellees' title.

The principle has been frequently enunciated and steadfastly adhered to by this court, that to maintain such a suit it is indispensable for the plaintiff to allege and prove that he holds both the legal title and possession of the land in controversy.

In Smith *v.* Thomas, 99 Va. 86, 37 S. E. 784, Cardwell, J., after

laying down the foregoing rule, observes: "* * * And, even where such a bill avers title and possession of the lands in plaintiff, if, upon the hearing of the cause, the evidence failed to show his possession, the bill would be dismissed for the want of jurisdiction in a court of equity." Carroll *v.* Brown, 28 Grat. 791; Stearns *v.* Harmon, 80 Va. 48; Otey *v.* Stuart, 91 Va. 714, 22 S. E. 513; Va. Coal & Iron Co. *v.* Kelly, 93 Va. 332, 24 S. E. 1020; Kane *v.* Va. Coal & Iron Co., 97 Va. 329, 33 S. E. 627; Glenn *v.* Brown, 99 Va. 322, 38 S. E. 189; Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227; Neff *v.* Rymon, 100 Va. 521, 42 S. E. 314; Glenn *v.* West, 103 Va. 521, 49 S. E. 671; Tax Title Co. *v.* Denoon, 107 Va. 201, 57 S. E. 586.

In this case the evidence fails to sustain the allegation that the plaintiffs were in possession of the land at the time of the institution of the suit in January, 1908.

The foundation of their claim to possession rests upon the alleged attornment to them by Davenport, who acquired possession under a lease from Isaac L. Patrick. This lease expired in the fall of 1907, but possession was continued under it until March 1, 1908. The rights of Patrick under the lease devolved upon the appellants as his grantees, and the attempted attornment by their tenant to the appellees by delivery of the keys to the premises was a fraud on the rights of the landlord, in which the appellees participated, and they took in subordination to those rights.

In Emerick *v.* Tavener, 9 Grat. 220, 223, 58 Am. Dec. 217, Lee, J., says: "A tenant cannot be permitted to question or impugn the title of his landlord during the continuance of the tenancy, nor until he has restored the possession or done what would be regarded as equivalent; nor can he be permitted to deny that the possession so received was the possession of his landlord. And the rule is extended to the case of a tenant acquiring the possession by wrong against the owner, and to one holding over after the expiration of his lease; and it applies, whether the question arises directly in an action brought against the tenant to recover the possession, or in a collateral form in some other action." Again, at page 225, of 9 Grat. (58 Am. Dec. 217), the learned judge remarks: "Thus Alton acquired by the conveyance from Emerick and his transfer of the possession, as against the lessor Tavener, no greater right than that by which Emerick held the possession. He took the premises in the same plight and condition in which they were held by him, and with all the duties and responsibilities, so far as Tavener was concerned, which could attach to Emerick himself. This doctrine, that a tenant cannot be permitted by an act of his during the tenancy, or until he surrenders the possession, to call in question his landlord's title, is as well sustained in reason and justice as it is supported by numerous authorities."

In Reusens *v.* Lawson, 91 Va. 226, 237, 21 S. E. 347, 350, the court says: "The relation of landlord and tenant is one carefully guarded by the law, and it will not allow one who has come into the possession of land under another to set up an adverse claim to it without full notice of his disclaimer or assertion of adverse title." Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233; Neff *v.* Rymon, supra.

Applying these principles to the evidence, it is clear that the plaintiffs were not in possession of the land at the institution of this suit, and therefore were not entitled to invoke the equitable jurisdiction of the court.

For these reasons, the decree appealed from must be reversed and the bill dismissed.

Reversed.

VIRGINIA-CAROLINA RY. CO. *v.* CLAWSON'S ADM'R.

Sept. 15, 1910.

[68 S. E. 1003.]

1. Railroads (§ 308*)—Death of Pedestrian—Negligence—Evidence—Weight.—In an action against a railway company for the death of a boy struck by a locomotive, evidence held to show that the engineer could not have discovered decedent's peril in time to have saved him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356-1359; Dec. Dig. § 398.*]

2. Railroads (§ 396*)—Contributory Negligence—Capacity of Children—Burden of Proof.—The burden was on a railway company sued for the death of a boy struck by a locomotive to rebut the legal presumption that he was incapable of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1342; Dec. Dig. § 396.*]

3. Negligence (§ 85*)—Degree of Care Required of Infants.—Ordinarily less care is required of an infant than of an adult respecting his own personal safety, but his responsibility is always to be measured according to his maturity and capacity as determined by the particular circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-129; Dec. Dig. § 85.*]

4. Railroads (§ 382*)—Contributory Negligence—Infants.—An intelligent boy, 11 years old, who had kept a refreshment stand, had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.